BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6631 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

EARL G. ROGERS, JR.
(Claimant-Respondent)

S.S.A. No.

YELLOW CAB COMPANY
(Employer-Appellant)

Employer Account No.

PRECEDENT
BENEFIT DECISION
No. P-B-195

FORMERLY
BENEFIT DECISION
No. 6631

The employer appealed from Referee's Decision No. LA-19850 which held that the claimant was not subject to disqualification under section 1256 of the Unemployment Insurance Code and that the employer's reserve account was not relieved of charges under section 1032 of the code. Oral argument was presented by the employer.

STATEMENT OF FACTS

The claimant was employed by the appellant as a cab driver commencing February 17, 1960. At that time he received a course of instruction concerning the company's rules and the Motor Vehicle laws with which he was expected to comply. Shortly after the end of the course, the claimant was involved in a minor accident when he backed into a parked car. He was warned that he would be discharged if involved in one more accident within a year.

On September 9, 1960, the claimant was enroute to pick up a passenger. He was approximately 40 feet behind

the car preceding him. He was hailed by someone on the left side of the street and glanced toward the person hailing him. He heard the screech of brakes, immediately looked to the front, and applied his own brakes when he saw that the traffic in front of him had stopped. He was unable to stop before colliding with the rear of the car preceding him. He was discharged on September 12, 1960.

The collision was observed by two police officers and the claimant was cited under section 22350 of the California Vehicle Code for "excessive safe speed 15 MPH in a 25 MPH zone." Bail was set at $22.

The claimant appeared in the appropriate court and admitted that the accident was his fault. After he had explained the circumstances, the judge suggested that he plead not guilty and await a trial. Since the claimant intended to leave the state he did not await the trial but pleaded guilty. A $6 fine was imposed.

On February 7, 1961 we received into evidence a copy of the traffic officers' report of the accident. The officers estimated the claimant's speed as 15 miles per hour, based on the length of the skid marks of the taxi cab. The officers reported that the claimant stated "that a man standing on the north curb in front of the Post Office yelled 'Hey Taxi.' He stated he turned and saw the man waving at him and was thinking about how he could turn around to pick him up when he looked ahead and saw that Vehicle #2 (the car preceding the claimant) was stopped. He stated that he put on his brakes, but could not stop in time." The report also indicated that the weather was clear and the streets were dry.

The claimant testified that in glancing toward the individual who shouted for the taxi, he intended merely to identify such person and to inform a dispatcher by radio of a possible customer. This was the customary procedure, although not mandatory. During the aforementioned course of instruction the claimant, as well as other drivers, had been told that when they heard someone hailing a cab they should proceed to the curb and stop before glancing around.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant who has been discharged for misconduct connected with his most recent work. Section 1032 of the code provides that the employer's account may be relieved of charges under such circumstances.

In Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 NW 636, the Supreme Court of Wisconsin stated:

> ". . . The term 'misconduct' as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute."

We quoted the above definition in Benefit Decision No. 4648 and others, indicating our acceptance of it.

The factual situation in the Boynton case is helpful in interpreting the definition. The claimant therein had been employed as a cab driver for approximately eight weeks when he was discharged upon the basis of his entire record of violations of the company's rules. The first violation occurred when the claimant charged a passenger 40¢ for a trip and turned in to the company only 25¢. The company learned of this when the passenger complained that he was overcharged. The claimant offered his explanation, which was accepted with a warning. The next three violations were the result of minor accidents which

occurred within the following month. The claimant did not report the first accident to the employer. He explained that he failed to do so because no damage resulted from the accident. The explanation was accepted and the claimant was warned. The second accident was reported but the claimant did not include in his report the fact that there had been a personal injury. He was again warned. The third accident occurred when the claimant's cab skidded down the ramp leading from the garage to the street and collided with another car. The ramp was coated with ice.

In contending that the claimant was guilty of misconduct connected with his work, the employer in the Boynton case submitted argument which is similar to the argument submitted by the employer in this case.

> ". . . If an employer discharges an employee for negligence, he discharges such employee for misconduct. The term negligence connotes fault. Implicit in the term is the idea that the person guilty of negligence has failed to comply with standards of care which are observed by the great mass of mankind under the same or similar circumstances. With certain exceptions not here material, where the law, by statute or otherwise, imposes liability without fault of the party against whom the liability is alleged to exist, it is impossible for a person to be negligent unless he violates the standards of care which have been developed and promulgated for the protection of individuals in a highly complex society. A violation by a taxi cab driver of the standards of care which constitutes negligence is likewise a violation of the rules of the plaintiff (employer). . . . None of the rules are arbitrary and it would seem too clear for argument that if an employee is discharged for the violation of any of these rules, he is discharged for misconduct."

The court did not agree with the argument. It held that "neither Neubeck's violations of the appellant's rules in failing to properly report two of his accidents nor his record in respect to accidents . . . constituted misconduct . . ." In so holding, the court quoted with approval from an English case (citation omitted):

"As a general rule it may be said that a single instance of negligence or a mistake is not sufficient evidence of misconduct. . . .

"But to this rule there are exceptions . . . and when the direct consequences of an act or omission are fairly obvious to an applicant, and are such as to be likely to cause serious loss to the employer, his business or his property, a finding of misconduct is not unreasonable. . . .

"But though one instance of negligence or a mistake may not amount to misconduct, a recurrence or repetition of the act, or of other acts may indicate a culpability which may fairly be described as misconduct. I think that the point is reached when it can be said that the behavior of the applicant shows a wanton or deliberate disregard of his employer's interests or of the applicant's duties. . . . Here again, is a question of fact to be determined upon a consideration of all the circumstances. The standard or test will not be the same in all cases. It will vary with the degree of responsibility or skill which the employee is engaged to exercise. The number of warnings given may be an important factor and the evidence of them should be definite. . . . In any case misconduct must be proved and not assumed."

Section 22350 of the California Vehicle Code provides:

"Basic speed law. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

The appellant has cited and referred to a number of our decisions as bearing upon this case. However, we feel that we need not discuss such decisions since the reasoning therein is reflected in our quotations from the Boynton case. The employer has also mentioned Benefit Decision No. 59-2718 for the purpose of distinguishing

such decision from the present situation. One of the factors leading to our conclusion in Benefit Decision No. 59-2718 was that no evidence had been presented to show that the claimant therein had been cited for a traffic violation. We held that the claimant's actions did not show a wilful or wanton disregard of the employer's interest and that his discharge was for reasons other than misconduct.

In this case, the claimant was cited under section 22350 of the California Vehicle Code. We do not consider the fact of citation controlling in this case, but only one of the factors which we must consider in arriving at our conclusion. The quoted section of the vehicle code is so phrased as to allow the driver of a vehicle to exercise judgement in the operation of such vehicle. Assuming that the claimant was careless as found by the traffic officers involved, his carelessness was, at most, an error of judgement. Admittedly, it was his fault that the collision occurred. However, he was following the vehicle preceding him at a reasonable distance and erred only when he withdrew his attention from the road when he was hailed by a person on the sidewalk. It appears to us that the claimant's action could readily be defined as a reflex action in response to the call, especially since it was the practice of the taxi drivers to seek to identify such a person so that the company could be informed of a possible customer. The testimony of the claimant concerning his reason for glancing away from the road appears more reasonable than his purported statement, as related by the traffic officers in the report of the accident, since the claimant was on his way to pick up a fare and was not cruising to locate a fare. To repeat, we are convinced that the claimant was guilty of no more than an error in judgement; and this was not misconduct within the definition of the Boynton Cab Company case and section 1256 of the code.

DECISION

The decision of the referee is affirmed. Benefits are payable if the claimant is otherwise eligible. The

employer's account is not relieved of charges under section 1032 of the code.

Sacramento, California, March 24, 1961.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ERNEST B. WEBB, Chairman

ARNOLD L. MORSE

GERALD F. MAHER

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6631 is hereby designated as Precedent Decision No. P-B-195.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT